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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 774

JACK BARG,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION OF JACK BARG, PETITIONER, FOR REHEARING AND RECONSIDERATION, AND SUPPORTING BRIEF.

RICHARD E. WESTBROOKS,
3000 South State Street,
Chicago, Illinois,

BRIEN McMAHON,
WALTER E. GALLAGHER,
Washington, D. C.,
Counsel for Petitioner.

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PETITION OF JACK BARG, PETITIONER, FOR REHEARING AND RECONSIDERATION.

MAY IT PLEASE THE COURT:

The Petitioner, Jack Barg, comes now and files this, his petition for rehearing and reconsideration and respectfully requests this Honorable Court to vacate and set aside the order entered April 10, 1944, denying the application by your petitioner for Writ of Certiorari to the Supreme Court of Illinois, and Supporting Brief.

In the instant case the application for the issuance of a Writ of Certiorari to the Supreme Court of the State

of Illinois to review the final judgment of conviction against the petitioner, having been denied without an expression by this Honorable Court of its reason for such denial, which is the usual practice upon such an application; the numerous grounds for denial of an application of this kind as shown by the authorities collected and discussed in *Jurisdiction of the Supreme Court of the United States*, Robertson and Kirkham (1936), pars. 287, 288, and the further restriction under the practice in the preparation of Petitions for Rehearing and Reconsideration, prohibiting the petitioner from rearguing or attempting to present more clearly the questions and reasons for granting the application (*Jurisdiction of the Supreme Court of the United States*, Robertson and Kirkham (1936), par. 288, p. 552), which questions and reasons were originally submitted, all have a tendency to place the applicant in a quandary as to the proper and correct contents of his Petition for Rehearing and Reconsideration, which will not only meet with the approval of this Honorable Court, but will aid the Court in the discovery of a valid reason for granting to this humble petitioner the prayer of his petition for the issuance of the Writ of Certiorari.

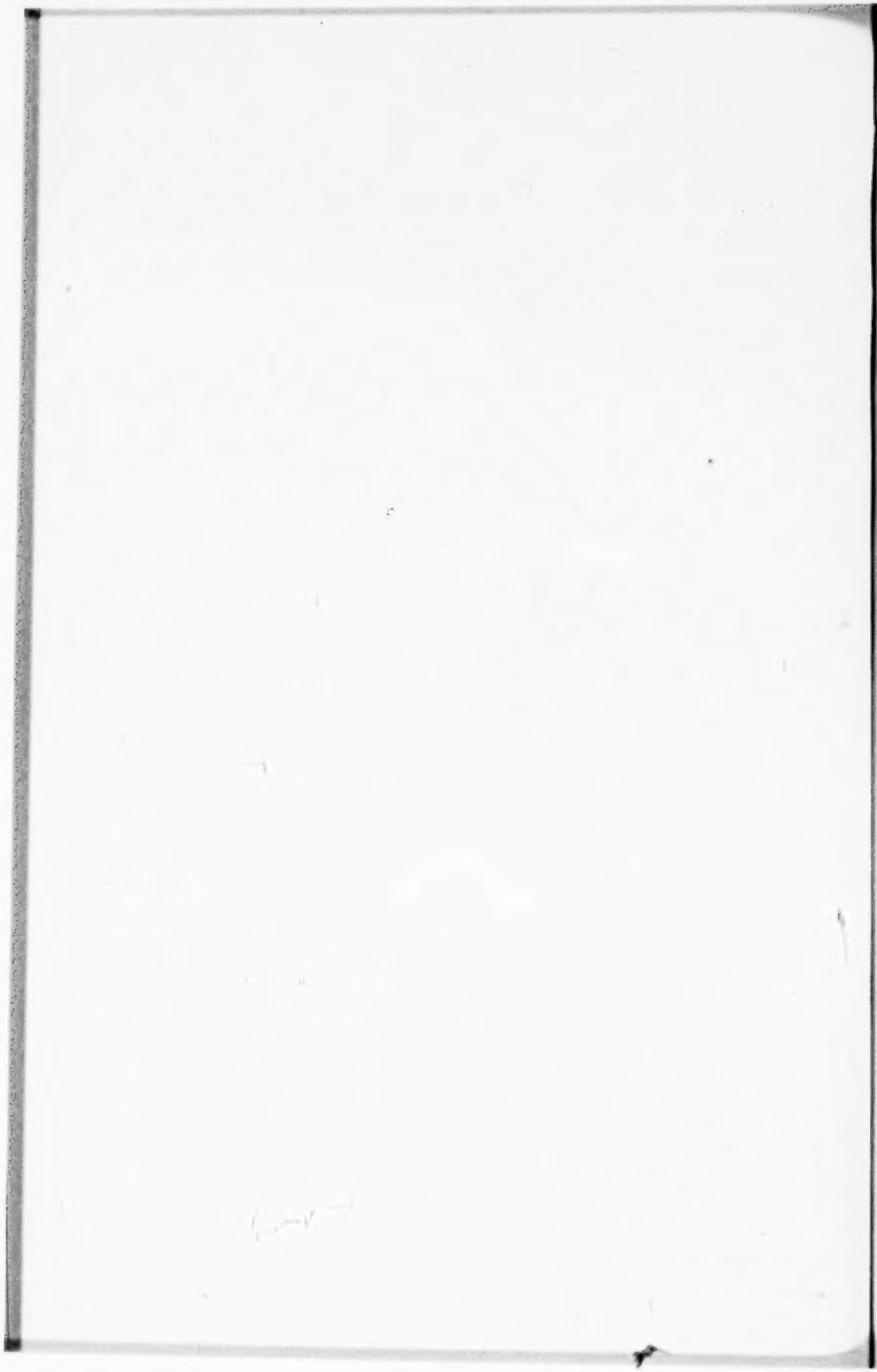
We appreciate the fact that the first question for determination in this proceeding is, **was the petitioner denied the due process of law and the equal protection of the laws as guaranteed by the 14th Amendment of the Federal Constitution?**

We further appreciate the fact that the second question then to be considered by this Honorable Court is, **does the record in this proceeding show that the petitioner claimed the benefits of his federal constitutional rights in the State Court proceedings and that the highest Court in the state by its final judgment denied to the petitioner his federal constitutional rights so claimed?**

The petitioner respectfully submits to this Honorable Court:

1. That he was denied the due process of law and the equal protection of the laws as guaranteed by the 14th Amendment of the Federal Constitution.
2. That the record in this proceeding shows that the petitioner claimed the benefits of his Federal Constitutional rights in the state court proceedings and that the highest court in the state by its final judgment denied to the petitioner his Federal Constitutional rights so claimed.

It is further respectfully submitted that the contention of the petitioner as stated in the above and foregoing paragraphs 1 and 2, being supported by the record in the case at bar, this Honorable Court should allow this Petition for Rehearing and Reconsideration, grant to your petitioner the prayer of his application for Writ of Certiorari and make such disposition of this case as justice may require.



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Respondent.

BRIEF IN SUPPORT OF PETITION FOR REHEARING AND RECONSIDERATION.

I.

THE PETITIONER WAS DENIED THE DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE 14TH AMENDMENT OF THE FEDERAL CONSTITUTION.

The term "due process of law" is so incomprehensive and elastic that any effort on the part of the petitioner to state a fixed definition would be futile. It would be difficult, perhaps impossible, to find in the reports a defini-

tion of the term "due process of law" or "law of the land" which is accurate, complete and appropriate under all circumstances. The peculiar necessities which call for the action of an officer, and whether a power was exercised in the same manner prior to the adoption of the Constitution, without being regarded a violation of the principles of the Magna Charta may each be considered in determining whether a party litigant has been accorded the "due process of law" within the meaning of the 14th Amendment of the Federal Constitution. The term "due process of law" is usually declared as an alternative for the expression contained in the Magna Charta—"*nisi per legale judicium parium suorum, vel per legem terrae.*"

The term, "equal protection of the laws" is also as elastic and definitely indefinable as the term "due process of law" and to this Honorable Court will be left the final construction of the terms herein mentioned and their application to the state of facts appearing in the record, the petitioner will not encumber this petition with the citation of numerous authorities or quotations from previous opinions rendered by this Honorable Court and the highest courts of the states of the United States. It will suffice to say that the Constitution has committed to this Honorable Court the responsibility of the construction and application of the provisions of the 14th Amendment, and the petitioner will therefore make a sincere effort to bring his case within the terms of the 14th Amendment so as to entitle him to its protection and a review of his conviction by this Honorable Court.

What the Record Shows.

The record shows a timely petition and motion to suppress all evidence resulting from the search of the petitioner's automobile prior to his arrest (R. pp. 5, 6). The petition and motion contains facts showing: 1. That the

petitioner was not driving his automobile but was riding as an occupant. 2. That he was not violating any laws of the State of Illinois or City of Chicago. 3. That said police officers on **mere suspicion** searched the trunk of the automobile and found automobile tires and other personal property. 4. That the search of the automobile trunk was made after the officers had searched the person of the petitioner from whose person they took the key to unlock the automobile trunk. 5. That after the search of the automobile trunk and arrest of the petitioner was made by the officers, criminal proceedings were based upon the result of the search of the automobile trunk of the petitioner. 6. That the searches and seizure were made on *mere* suspicion and without warrant or other process. 7. That the automobile tires were in possession of the officers and petitioner was informed and believed the State's Attorney intended to use the same as evidence against him during trial of the criminal proceedings. 8. That the use of the goods taken from the automobile trunk of the petitioner as evidence against him would violate his constitutional rights (R. p. 6). The petition concluded that the goods taken from his automobile trunk and all evidence obtained as a result of the search by the officers be suppressed.

The state did not file an answer to the petition and motion and on the hearing of the motion before trial, called as its *only* witness the arresting officer (R. pp. 7, 8). The petitioner as his only witness testified to facts sustaining the allegations of his petition (R. pp. 6, 7). The arresting officer also testified to facts corroborating the testimony of the petitioner, the pertinent parts of the testimony of the officer relative to the search and arrest are as follows (R. p. 8):

> "This man fell out of the car. He fell out after the car stopped. The other man got away. Before the car stopped we did not sound the siren because we

were not allowed to. We had no means of signaling him. The car was stopped by my partner firing a shot at it before it stopped. I came up to Barg first and **searched him and then searched the automobile.** The car was not speeding and **they were not violating any law.** The only thing that attracted our attention to the car was that the lights were out on the car. **When we searched the car we found some tires in the trunk.** We had to **unlock the trunk and got the keys from the defendant when we searched him. We had no warrant for his arrest at the time we arrested him. We stopped the car on suspicion. The stopping of the car and the searching of the defendant and the car was on suspicion that he might be involved in something"** (R. p. 8). (Emphasis ours.)

Due Process of Law.

This Honorable Court has held that when the question of a denial of the due process of law in the selection of a grand jury is raised by a defendant in a criminal prosecution in a state court, a written motion or petition is filed setting up facts which are undenied, that the only question before the court is whether the petitioner made out a prima facie case showing a violation of his rights under the due process of law clause of the 14th Amendment. *Hill* v. *Texas*, 316 U.S. 400, 402. A stronger case is made by the record in the case at bar in that the facts set up in the petition and the testimony of the arresting officer, called as a witness for the state, on the hearing of the motion to suppress the evidence, corroborates the testimony of the petitioner and sustains the facts set forth in the petition that the search and arrest were on mere suspicion. In *Brown* v. *Mississippi*, 297 U.S. 278, 285 the question of the illegality of certain confessions was raised, this Honorable Court observed (p. 285):

> "The facts are not only undisputed, they are admitted, and admitted to have been done by officers of the state, etc."

We are limiting our claim that the petitioner was denied his constitutional rights under the 14th Amendment of the Federal Constitution, to the proceedings on the motion to suppress the evidence obtained as a result of a search without a warrant or other process and on **bare suspicion.** The only witness for the state testified that his sole reason for making the search of the person and automobile locked trunk of the petitioner **"was on suspicion that he might be involved in something."** No other ground or reason is found in the testimony of the arresting officer, although the State's Attorney and the Supreme Court of Illinois has injected in the record a ground for the search and arrest other than that stated by the officer who made the arrest and is the only person who could state the grounds upon which he made the search and arrest.

It is respectfully urged that a search, followed by an arrest, both of which are made on suspicion and the use of contraband articles resulting from such illegal search and arrest, over the objection of a defendant timely made, by motion to suppress, in a criminal case is as violative of his constitutional rights under the due process of law clause of the 14th Amendment of the Federal Constitution as is the admission in evidence of an involuntary confession of a defendant. This Honorable Court in *Brown* v. *Mississippi*, 297 U.S. 278, 284 reversed a judgment of conviction as violative of the due process of law clause of the 14th Amendment because of the admission of an involuntary confession admitted in evidence over the objection of the defendant where this court in quoting from the dissenting opinion of Judge Griffith of the state supreme court states:

> "The evidence upon which the conviction was obtained was the so-called confessions. **Without this evidence a peremptory instruction to find for the defendants would have been inescapable.**" (Emphasis ours.)

In the case at bar without the evidence obtained by the police officer as a result of the search of the locked automobile trunk of the petitioner, after having searched the person of the petitioner, all of which were on bare suspicion, as stated by the officer himself, a finding of not guilty would be inescapable. This Honorable Court has repeatedly held that the admission of an involuntary confession over the timely objection of a defendant in a criminal case was a denial of due process of law to such defendant and a judgment of conviction resulting would be declared void. *Brown* v. *Mississippi*, 297 U.S. 278, 286; *Chambers* v. *Florida*, 309 U.S. 227, 238.

In the case at bar there was enough before the trial court adduced on the motion to suppress to make known to the court that the search and arrest were on mere suspicion, and therefore illegal, and the failure of the court to sustain the motion was sufficient for the Supreme Court of Illinois to have reversed the judgment. This Honorable Court in *Brown* v. *Mississippi*, 297 U.S. 278, 283 again quotes from the dissenting opinion of Judge Griffith and states (p. 283):

> "There was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary; and the failure of the court then to exclude the confessions is sufficient to reverse the judgment, **under every rule of procedure that has been prescribed and hence it was not necessary subsequently to renew the objections by motion or otherwise.**" (Emphasis ours.)

"Due process of law" prohibits compulsion of a defendant to give evidence in a criminal case as a witness against himself. Art. II, Sec. 10, Illinois Constitution; 5th Amendment United States Constitution. It is under these provisions of the Constitutions, both state and Federal, that

the admission in evidence in a criminal case, over the timely objection made by a defendant, that this Honorable Court has reversed judgments of convictions affirmed by the highest court of the state, on the ground that such convictions violated the due process of law clause of the Federal Constitution. Under these same provisions of both state and Federal Constitutions the courts have held that all evidence obtained by an illegal search and seizure, admitted against a defendant in the trial of a criminal case, where an objection is timely made and conviction results, to be violative of the due process of law clauses of both state and Federal Constitutions. Art. II, Sec. 2, Illinois Constitution; 14th Amendment, Sec. 1 United States Constitution. Such illegal search and seizure has also been held to violate both state and Federal Constitutions. Art. II, Sec. 6, Illinois Constitution; Sec. 1, 14th Amendment, United States Constitution. We will not restate the long line of cases sustaining this contention and refer this Honorable Court to the petition for Writ of Certiorari filed in this cause (pp. 18-22). Since the denial of the application in the case at bar this Honorable Court on May 1, 1944 in *Ashcraft* v. *Tennessee*, 391 October Term, again sustained the contention of the petitioner that the admission of an involuntary confession over the objection of a defendant rendered the conviction void as violative of the due process of law clause of the 14th Amendment and states:

> "The Constitution of the United States stands as a bar against the conviction of any individual in an American Court by means of a coerced confession."

Where it appears that a defendant has been denied the due process of law and the equal protection of the laws as guaranteed by the 14th Amendment of the United States Constitution, his conviction should be set aside or his im-

prisonment terminated although he failed to raise a Federal constitutional question during the trial. The violation of constitutional rights in a criminal case may appear from facts and circumstances. *Mitchell* v. *Youell*, 130 F. 2d 880 (CCA 4). In the last cited case a Writ of Habeas Corpus was held to be a proper remedy to secure the discharge of a prisoner, where it appeared that he had been denied the due process of law in violation of the 14th Amendment to the Constitution of the United States. It appeared from the petition that the prisoner had been placed upon trial without counsel, and the penalty imposed was disproportionate for the offense.

An arrest, search or seizure on mere suspicion is illegal and unreasonable.

This Honorable Court in *Chambers* v. *Florida*, 309 U.S. 227, 238, and numerous other cases has condemned an arrest on suspicion without a warrant and where such arrest results in compelling a defendant to make an involuntary confession which is admitted in evidence in a criminal case over the timely objection of the defendant, a conviction resulting from such procedure has been held to violate the due process of law clause of the 14th Amendment to the Federal Constitution. This Honorable Court in reversing the judgment of conviction states (p. 238):

> "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."

In the case at bar the search, seizure and arrest were on mere suspicion which fact is admitted and not controverted. The use of contraband property resulting from such search,

seizure and arrest as the basis for conviction and sentence of the petitioner, where the record shows a timely motion to suppress the evidence, is a clear denial of the due process of law.

The Supreme Court of Illinois (R. p. 27) holds that, arrests upon bare suspicion are not permitted under the law of the State of Illinois. The cases cited in the Petition for Writ of Certiorari (R. pp. 6, 18-22) fully sustain the contention of the petitioner and will not be repeated.

We believe it to be elemental, that every search, seizure or arrest, admitted or proved to be on **bare suspicion** is unreasonable and illegal, prohibited by both state and federal constitutions, Art. 2 Illinois constitution, sec. 6; Sec. 1, Federal Constitution, 14th Amendment.

It is the duty of the Supreme Court of the United States to appraise the evidence as it relates to the constitutional right of a defendant.

In *Chambers* v. *Florida*, 309 U.S. 227, 228, this Honorable Court laid down the well-known rule of law that, where a defendant claims that he has been denied the due process of law and the equal protection of the laws as guaranteed by the 14th Amendment it is the duty of this Honorable Court to make an independent determination, by a review of the facts upon which the issue necessarily turns, and states (pp. 228, 229):

> "First. The State of Florida challenges our jurisdiction to look behind the judgments below claiming that the issues of fact upon which petitioners base their claim that due process was denied them, have been finally determined because passed upon by a jury. However, use by a State of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment. Since petitioners have seasonably asserted the

> right under the federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means proscribed by the due process clause of the Fourteenth Amendment, **we must determine independently whether petitioners' confessions were so obtained, by review of the facts upon which that issue necessarily turns.**" (Emphasis ours.)

This principle of law is supported in *Smith* v. *Texas*, 311 U. S. 128, 130 and cases cited in the *Smith* case.

The petitioner was entitled to have his guilt or innocence determined without reliance upon the contraband goods illegally seized after a search on bare suspicion of his automobile. The admission by the arresting officer (R. p. 8) that the search, seizure and arrest were made on **bare suspicion**, we submit is sufficient to sustain the contention of the petitioner that he was denied due process of law and the equal protection of the laws as guaranteed by the 14th Amendment.

Both the trial court and the Supreme Court of Illinois were of opinion that the evidence failed to support the charge that the search, seizure and arrest were on bare suspicion. For that reason the Supreme Court approved the trial court's action in denying the petitioner's timely motion to suppress the evidence illegally obtained from the petitioner. But the question decided rested upon a charge of denial of equal protection of the laws, a basic right protected by the Federal Constitution. And it is therefore the responsibility of this Honorable Court to appraise the evidence as it relates to this constitutional right. *Smith* v. *Texas*, 311 U.S. 128, 130. The case at bar is identical with the case, *Smith* v. *Texas*, 311 U.S. 128, as it relates to the responsibility of this Honorable Court to appraise the evidence. A fair and just appraisal of the

evidence on the motion to suppress must inevitably result in this Honorable Court finding that the search, seizure and arrest were on bare suspicion, unreasonable and violative of the 14th Amendment of the Federal Constitution.

II.

THE RECORD IN THIS PROCEEDING SHOWS THAT THE PETITIONER CLAIMED THE BENEFITS OF HIS FEDERAL CONSTITUTIONAL RIGHTS IN THE STATE COURT PROCEEDINGS AND THAT THE HIGHEST COURT IN THE STATE BY ITS FINAL JUDGMENT DENIED TO THE PETITIONER HIS FEDERAL CONSTITUTIONAL RIGHTS SO CLAIMED.

Since the petitioner has referred to the various pages of the record supporting the propositions of law urged in his behalf, we believe it only necessary to briefly point out the pages of the record which show that the petitioner claimed the benefits of his constitutional rights in the trial and Supreme Courts. The petition to suppress evidence claimed to have been illegally obtained recites that the constitutional rights of the petitioner were violated (R. pp. 5, 6). The argument of counsel for the petitioner in the trial court (R. pp. 9-11) clearly shows that illegality of the search and arrest were urged. The first and second assignment of errors in the Supreme Court again challenged the overruling of the motion to suppress and the admission of the evidence obtained by the illegal search and seizure was again urged. The Supreme Court in its opinion also denies the contention of the petitioner that his constitutional rights were violated (R. p. 27) and the Petition for Rehearing (R. p. 48) urges that the opinion of the Supreme Court denied to the petitioner the equal protection of the laws and the due process of law as guar-

anteed by the 14th Amendment of the Federal Constitution. We believe the record clearly shows that the petitioner has continuously urged the benefits of the 14th Amendment of the Federal Constitution and that the record sustains the claim. Without the admission of the evidence illegally secured there would not have been any evidence to sustain the conviction and we dare say that if the petitioner had been charged with the burglary of a building and the record failed to contain any evidence that he was near the building alleged to have been burglarized, that this Honorable Court would not hesitate to review a judgment of conviction although the same had been affirmed by the highest court of the state.

It is respectfully and humbly requested, by the petitioner, that this Honorable Court will grant a rehearing to the petitioner and reconsider the points of well-settled law herein urged on his behalf.

Respectfully submitted,

RICHARD E. WESTBROOKS,
BRIEN McMAHON,
WALTER E. GALLAGHER,
Counsel for Petitioner.

Certificate of Counsel.

I, Richard E. Westbrooks, counsel for the above named Jack Barg, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

RICHARD E. WESTBROOKS,
Counsel for Petitioner.